



Natural Resources Conservation Service
1201 NE Lloyd Blvd., Suite 900
Portland, OR 97232

January 8, 2008

OREGON BULLETIN NO. OR-190-2008-2

SUBJECT: Wetland Conservation Compliance

PURPOSE: To provide clarification to NRCS and FSA on NRCS responsibilities for conducting certified wetland determinations and use of revised form AD-1026.

EXPIRATION DATE: Effective until superseded.

Background: In recent years, several policy changes and clarifications have been made to the Wetland Conservation Compliance provisions of the Food Security Act of 1985 that have implications for when NRCS is required to conduct certified wetland determinations. These policy changes have been incorporated into the [National Food Security Act Manual \(NFSAM\)](#) through Circulars No. 1 and 2. On April 20, 2006, FSA issued a revised [Form AD-1026](#) which contains several changes designed to improve NRCS administration of the HELC/WC provisions as amended. NRCS received further guidance on conducting certified wetland determinations through National Bulletins [180.6.8](#), [180.7.3](#), and [180.7.4](#) and [NRCS/COE Memorandum to the Field](#). Similar guidance was given to FSA in [Handbook 6-CP Par. 456](#). NRCS and FSA must be familiar with these changes as they affect when NRCS is required to conduct certified wetland determinations for Food Security Act purposes.

Explanation of Previous National Guidance:

NRCS/COE Memorandum to the Field (February 25, 2005): Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and Section 404 of the Clean Water Act

In 1994, the Departments of Agriculture (USDA), Interior, Army and the Environmental Protection Agency entered into a Memorandum of Agreement (MOA) concerning the delineation of wetlands for purposes of both Section 404 of the Clean Water Act (CWA) and the Food Security Act. The 1996 and 2002 Food Security Act amendments changed the wetland provisions, producing inconsistencies between the CWA and the Food Security Act. In January 2005, USDA and the Army Corps of Engineers (COE) withdrew from the MOA and the authority for NRCS to make wetland determinations pursuant to the Clean Water Act was terminated.

NRCS and the COE issued a "Memorandum to the Field" on February 25, 2005, that outlines the responsibilities of each agency. This document provides that NRCS will make wetland determinations *on land for participants, or persons intending to become participants, in USDA programs when the proposed activity involves draining, dredging, filling, leveling, or otherwise manipulating the land, as defined in the Food Security Act, for the purpose of, or to have the effect of making possible the production of an agricultural commodity* ("agricultural

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commodity” means any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters, or sugarcane). For wetland determinations solely for CWA purposes, participants should be referred to the COE.

According to this guidance, NRCS has responsibility for conducting certified wetland determinations for Food Security Act purposes when: 1) it is for a USDA program participant (or person intending to become a participant), and 2) the manipulation activity is for the purpose of, or has the effect of, making possible the production of an agricultural commodity. This means that, in some cases, NRCS is not required to conduct certified wetland determinations for USDA participants/applicants. The trigger for a certified wetland determination is whether or not production of an agricultural commodity (i.e., annually-tilled crop) could be made possible by the manipulation.

NFSAM 514.20d states that “making production possible” means manipulation:

- which allows or would allow production of an agricultural commodity where such production was not previously possible, or
- making an area farmable more years than previously possible, or
- which reduces crop stress and allows increased crop yields, or
- after November 28, 1990 that allows forage production or pasture and hayland use. On sites with woody vegetation, trees and stumps must be removed to constitute “making production possible.”

For example:

NRCS is not required to conduct a certified wetland determination when:

- Participant tiles an existing orchard or vineyard without additional activity to clear the woody vegetation. In this instance, the manipulation did not make possible the production of an annually-tilled crop.
- Participant wants to develop a spring to supply livestock water on a ranch. Not a Food Security Act issue because production of an annually-tilled crop was not made possible.
- Participant excavates a wetland to create a pond for livestock and wildlife and places spoils on uplands. Not a Food Security Act issue because production of an annually-tilled crop was not made possible.

Conversely, NRCS is required to conduct a certified wetland determination when:

- Participant tiles an existing orchard or vineyard and clears woody vegetation in order to change land uses and grow an annually-tilled crop. This is a Food Security Act issue because the manipulation was for the purpose of making production possible.
- Participant fills and levels a wetland on a perennial grass seed field. This is a Food Security Act issue because the manipulation had the effect of making production possible even though the participant is not currently growing an annually-tilled crop.

Clearly, the Food Security Act as amended does not restrict all manipulations in wetlands on agricultural lands. However, many of these activities may be regulated by the Clean Water Act

and/or Oregon State Removal-Fill Law and participants should be referred to the COE and Oregon Department of State Lands (DSL) whenever wetland impacts are unavoidable. In some cases where wetland manipulations are not within the purview of the Food Security Act, NRCS is not required to conduct certified wetland determinations and participants may have to work solely with COE/DSL to delineate wetlands and obtain necessary permits.

Guidance on AD-1026:

Question #5 – *For farm loan applicants only: Will you conduct any activities for fish production, trees, vineyards, shrubs, building construction, or other non-agricultural purposes on lands for which a wetland determination has not been completed by NRCS?*

According to *National Bulletin 180.7.3* and *FSA Handbook 6-CP Par. 456*, if participant answers “Yes” to Question #5 and “No” to Questions 10A, B, C on the AD-1026, NRCS is not required to conduct a certified wetland determination. This issue does not impact eligibility under the Food Security Act and NRCS no longer has responsibility for making determinations that are strictly for CWA purposes.

Procedures: If NRCS receives a referral for a certified wetland determination when only Question #5 has been marked “Yes,” NRCS District Conservationists will return the AD-1026 to FSA with a letter citing *National Bulletin 180.7.3* and *FSA Handbook 6-CP Par. 456* that it is not a Food Security Act issue and recommend that the participant be referred to the COE and DSL. A copy of correspondence shall be filed in the appropriate tract file.

Question #10 – *Since December 23, 1985, or during the current crop year, or during the term of a requested USDA loan, has anyone performed, or will anyone perform any activities to:*

- A. *Create new drainage systems, or conduct land leveling, filling, dredging, land clearing, excavation, or stump removal, that has NOT been evaluated by NRCS? If "YES", indicate year(s):*
- B. *Improve or modify an existing drainage system that has NOT been evaluated by NRCS? If "YES", indicate year(s):*
- C. *Maintain an existing drainage system that has NOT been evaluated by NRCS? If "YES", indicate the year(s):*

Question #10 has been revised to differentiate between new drainage or land disturbance (#10A), modification and improvement (#10B), and drainage maintenance (#10C). According to *National Bulletins 180.6.8* and *180.7.4* and *FSA Handbook 6-CP Par. 456*, NRCS assistance is no longer required for normal maintenance of existing drainage systems. Therefore, NRCS is not required to conduct a certified wetland determination when an AD-1026 is received that has only Question #10C marked “Yes.”

Maintenance, as defined on Form AD-1026, is “The repair, rehabilitation, or replacement of the capacity of existing drainage systems to allow for the continued use of wetlands currently in agricultural production and the continued management of other areas as they were used before December 23, 1985. This allows a person to reconstruct or maintain the capacity of the original

system or install a replacement system that is more durable or will realize lower maintenance or costs.”

Maintenance that restores the drainage to its original capacity is permitted under the Food Security Act of 1985, as amended. If the drainage maintenance activity might change the scope and effect of the original drainage system and impact wetland, farmed wetland (FW), or farmed wetland pasture (FWP), such as those on adjacent property, the participant should be advised to consider requesting an evaluation by NRCS as to whether or not the maintenance activity will result in conversion of those wetlands. If the participant does not request an NRCS evaluation, he or she does this at his or her own risk with regard to Wetland Conservation Compliance.

If FW or FWP has been abandoned (per regulations at 7 CFR 12.33(c)), maintenance is not permitted and can result in ineligibility. Abandonment is defined as the cessation for 5 consecutive years of management or maintenance operation related to the use of commenced conversion (CC), FW, or FWP. Land considered to be abandoned must meet wetland criteria.

Procedures: The attached flowchart describes the process for evaluating when drainage system should be considered maintenance. If NRCS receives a referral from FSA for a certified wetland determination because the participant answered “Yes” only to Question #10C on the AD-1026 (regarding maintenance of an existing drainage system), NRCS will return the request to FSA referencing *NFSAM 514.22f* and *514.23e* which states that producers **may**, but are **not required**, to request an on-site evaluation of the drainage maintenance plans prior to performing maintenance on Farmed Wetland or Farmed Wetland Pasture. However, NRCS and FSA should remind USDA participants to exercise caution when maintaining their drainage systems, so that they not improve the system and inadvertently drain neighboring wetlands or improve drainage on FW/FWP lands. Participants are responsible for their decisions on maintenance and drainage once they are informed using form AD-1026. FSA offices shall provide NRCS with an informational copy of the AD-1026 when the only reason for referral is a “Yes” designation on Question #10C. Since a certified wetland determination will not be provided to FSA in these cases, FSA shall not indicate a referral to NRCS is “pending” in the producer’s subsidiary file.

Question #11 – (*National Bulletin 180.6.8*) This question has been added to further assist NRCS in managing the Wetland Conservation Compliance workload. The participant is asked to identify the farm or tract for which he or she answered “Yes” in Questions #5 and/or #10, the activity that was conducted or is proposed, the current land use, and the county. This will enable NRCS to determine if the activity will constitute conversion, as defined in the Food Security Act (i.e., wetland manipulation that is for the purpose of or has the effect of making possible production of an annually-tilled agricultural commodity). Again, activities that affect wetlands but are not conversions are not subject to the Wetland Conservation Compliance provision.

Procedures: If participant answers “Yes” to Questions #5, #10A and/or #10B or #10C, FSA shall request the participant provide as much information as possible when responding to Question #11 and identify clearly on an aerial photograph the location of the manipulation. It is particularly important to note if the participant is intending to produce an annually-tilled crop on that land at any time.

Upon referral, NRCS Resource Soil Scientists will review information provided on AD-1026 to determine if the manipulation activities are for the purpose of, or will have the effect of, making

possible the production of an agricultural commodity. In some unique situations, manipulation activities may not make production of an annually-tilled crop possible (e.g., manipulations in orchards/vineyards where woody vegetation has not been cleared). If the manipulation activity is not for the purpose of, or will not have the effect of, making production of an agricultural commodity possible, then NRCS is not required to conduct a certified wetland determination because the activity does not affect eligibility for USDA programs under the Food Security Act.

If the Resource Soil Scientist determines that a certified wetland determination is not required, they will assist the District Conservationist in providing a letter to the participant, sent by certified mail, explaining why the activity described on the AD-1026 does not affect eligibility under the Food Security Act and that NRCS is not required to conduct a certified wetland determination. In the letter, NRCS shall also refer the participant to COE and DSL since their activities in wetlands may be regulated by those agencies. Copies of the AD-1026 and the letter shall be retained in the appropriate tract file.

If Questions #10A and/or #10B are marked "Yes" and the manipulation activity is for the purpose of, or has the effect of, making possible the production of an agricultural commodity, then the designated Resource Soil Scientist is required to conduct a certified wetland determination (follow [OR Bulletin 180-2007-1](#) for tracking procedures).

Priorities for doing Certified Wetland Determinations:

NRCS priorities for conducting certified wetland determinations remain consistent with previous guidance issued in [OR Bulletin 180-2006-2](#), with the clarification that determination requests where the manipulation does not make production of an annually-tilled crop possible will be considered a Priority #3. Even though NRCS may not be required to conduct a wetland determination for Food Security Act purposes, NRCS may choose to provide a wetland determination to any USDA program participant under Priority #3 as workload allows.

//signed//

BOB GRAHAM
State Conservationist

Enclosure: Determining Maintenance for Drainage Systems

DIST
AO

cc via website:

<http://www.or.nrcs.usda.gov/intranet/bulletins/bulletins07-08.html>
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